UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner/Cross-Respondent,	)	
	)	**Consolidated Appeal Nos.**
v.	)	**16-1450 and 16-1682**
	)	
MISSOURI RED QUARRIES, INC.,	)	
	)	
Respondent/Cross-Petitioner.	)	

PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

RULE 35(b)(1) STATEMENT

At issue in this case is whether Steve Johnston, one of ten employees at Missouri Red Quarries, Inc.'s ("Employer") quarry location in Missouri, is a statutory supervisor under the National Labor Relations Act ("Act" or "NLRA"). The Panel of this Court (Riley and Murphy, with Chief Judge Smith dissenting), in an Opinion dated April 6, 2017, deferred to the NLRB, finding that there is substantial evidence in the record to support the Board's decision that Johnston was a supervisor.

In his dissent, Chief Judge Smith began by stating: "The majority holds that an individual becomes a supervisor under the NLRA by merely recommending a family friend for hire." (Slip opinion p. 14). For the reasons clearly outlined in that dissent, the Company respectfully submits:

- The Panel Opinion conflicts with, and is contrary to, the decision of this Court in *Securitas Critical Infrastructure Services, Inc. v. National Labor Relations Board*, 817 F.3d 1074 (8th Cir. 2016) ; and
- The Panel Opinion also conflicts with, and is contrary to, the decision of the National Labor Relations Board in *Jefferson Chemical Co.*, 237 NLRB 1099 (1978).

Therefore, consideration of this case by the full Court is necessary to secure and maintain uniformity of this Court's decisions, and NLRB case law, on this important issue involving company-union relations.

STATEMENT OF THE CASE

The Union filed with the NLRB a Petition for Certification of Representative on April 29, 2015 (Case No. 14-RC-151115) (Jt. App. 376). An election was held on May 19, 2015 (Jt. App. 380), at which ten employees showed up to vote. The Union challenged the ballot of employee Steve Johnston, claiming that Johnston was a supervisor as defined by the Act and thereby not allowed to vote in the election.

A Hearing on the challenged ballot was scheduled and held by the Region before a Hearing Officer on June 8, 2015. The HO presided over a nine-hour Hearing, involving six witnesses (with some called to testify more than once), relating to Union's challenge of a single ballot. The HO then issued a thirteen-page Report, explaining in detail her credibility determinations, and ruling the issues (Add. 4; Jt. App. 391). Her Report included the following overall findings:

(at p. 1, Add. 4; Jt. App. 391):

> After conducting a hearing and carefully reviewing the evidence as well as the arguments made by the parties, **I conclude that Steve Johnston does not possess the indicia required to be a supervisor as defined by the Act, that Johnston is otherwise employed in the collective-bargaining unit**, and therefore recommend that Petitioner's challenge to his ballot be overruled and the ballot be opened and counted.

(at p. 5, Add. 8; Jt. App. 395):

> The Petitioner challenged the ballot of Steve Johnston on the ground that he is a supervisor within the meaning of Section 2(11) of the Act. **Johnston does not possess the indicia required to be a statutory supervisor; rather, he is a bargaining unit employee who spends the**

> **vast majority of his time performing bargaining unit work. Johnston is subject to the same working conditions as all other bargaining unit employees.** After the termination of Laird, Oglesby divided up Laird's duties and bestowed four individuals, including Johnston, with authority to manage the day-to-day operations of the Employer. While Johnston performs duties outside of unit work, these duties are managing certain paperwork and being a conduit of information from and to the Ironton quarry.
>
> (at p. 6, Add. 9; Jt. App. 396):
>
> While the Petitioner averred that it was relying on all 12 indicia to establish Johnston's supervisory status, it presented evidence on only two of the indicia: hire and discipline. The Petitioner's assertions that Johnston is a supervisor under the Act are based primarily on perceived authority and secondary indicia. **Taken together, the asserted possession of the two indicia, the perceived authority, and secondary indicia are insufficient to cloak Johnston in statutory supervisory status.** (Emphasis added.)

The Union filed Exceptions to the HO's Report (Jt. App. 405). On August 5, 2015, the RD issued his Decision and Certification of Representative (Add. 18; Jt. App. 437). In that Decision, the RD affirmed all of the HO's rulings made at the Hearing, and affirmed all of the HO's credibility resolutions. (RD Decision, at p. 1; Add. 18; Jt. App. 437). Notwithstanding, and though denying three of the Union's four Exceptions, the RD granted one of the Union's Exceptions, and thereby reversed the result of the HO's Report, and certified the Union (Add. 26; Jt. App. 445).

The Employer filed a Request for Review with the NLRB on August 28, 2015 (Jt. App. 450). By Order dated November 18, 2015 (Add. 27; Jt. App. 506), the NLRB denied the Request for Review.

The Union renewed its request to bargain with the Employer, and, pursuant to the standard procedures to test an NLRB Certification, the Employer refused to bargain. In response, the Union filed an unfair labor practice charge (NLRB Case No. 14-CA-165057) (Jt. App. 507), which was summarily processed accordingly to applicable procedures of the NLRB, resulting in the Decision (Add. 1; Jt. App. 532) now being reviewed by this Court, so as to allow the Employer to have this Court review the underlying Certification of Representative (Add. 18; Jt. App. 437).

All issues raised herein by the Employer were raised before the NLRB, in both the representation case and the unfair labor practice case.

ARGUMENT

The reasons supporting rehearing *en banc* in this case are outlined in detail in Chief Judge Smith's dissent to the Panel Opinion in this case. (Slip opinion pp. 14-20). The Employer further highlights the following points in support of this Petition.

A. "More Probing" Standard of Review:

First, the Employer highlights that the standard of review in this case is heightened because of the type of case involved. Since this case involves review of an NLRB determination of supervisory status under the NLRA, this Court has stated that, because of the "Board's inconsistent determinations in this regard," this Court's review "necessarily becomes more probing." *Schnuck Markets, Inc. v. National Labor Relations Board*, 961 F.2d 700, 704 (8th Cir. 1992). Further, in *Securitas Critical Infrastructure Services, Inc. v. National Labor Relations Board*, 817 F.3d 1074 (8th Cir. 2016), this Court outlined that the Court, in reviewing the Board's determination, must take into consideration "the record in its entirety including the body of evidence opposed to the Board's view." *Id*. at 1078.

The Panel Opinion referenced and acknowledged this heightened ("more probing" and "close") review (Slip opinion p. 7), but stated they were "not charged with evaluating the evidence *de novo*." (Slip opinion p. 13).

B. Conflict with this Court's *Securitas* Case:

Second, the Employer asserts that the Panel Opinion conflicts with, and is contrary to, the decision of this Court in *Securitas Critical Infrastructure Services, Inc. v. National Labor Relations Board*, 817 F.3d 1074 (8th Cir. 2016).

As outlined by this Court in *Schnuck Markets, Inc. v. National Labor Relations Board*, *supra*, 961 F.2d at 704, the Board is known for inconsistent determinations in regard to "supervisory status," demonstrating "'an institutional or policy bias on the part of the Board's employees' to expand the scope of the Act's protection." In other words, the Board's normal pattern is to try to find few employees as "supervisors" under the Act, so as to give the Act's protection to more employees. As the HO outlined in her Report (at p. 2 (Add. 5; Jt. App. 392)): "The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997)." That explains why most cases brought to circuit courts for review of NLRB orders relating to supervisor status result from an underlying Board determination that the employee did **not** meet the "supervisor" definition. For example, for cases before this Court, *see Securitas Critical Infrastructure Services, Inc. v. National Labor Relations Board*, *supra*; *National Labor Relations Board v. St. Clair Die Casting, L.L.C.*, 423 F.3d 843 (8th Cir. 2005);

Beverly Enterprises-Minnesota, Inc. v. National Labor Relations Board, 148 F.3d 1042 (8th Cir. 1998).

However, this case is exactly the opposite. In this case, the election results were five (5) to four (4) in favor of union representation, with the Union (rather than the Employer) challenging Johnston's ballot and claiming supervisor status (knowing that should Johnston's vote be against representation, the tie would go to the Employer, and the Union would lose the election). Accordingly, the Board seemingly went to great lengths, contrary to its precedent and policy of narrowly defining supervisory status, to define Johnston as a statutory supervisor, thereby resulting in the Union's win in the representation election. The Board simply did not apply the same narrow standard for supervisor status in this case, where the Union claimed an employee was a supervisor, as in other cases where the employer asserts supervisor status.

This difference in application of the standard, depending on which side is asserting supervisory status, is clearly illustrated by comparison of the facts and findings of this case with the facts and this Court's holding in *Securitas Critical Infrastructure Services, Inc. v. National Labor Relations Board*, 817 F.3d 1074 (8th Cir. 2016). In that case, the issue was whether or not lieutenants who serve as "response team leaders" during a security threat are statutory supervisors under the Act. The NLRB held, and this Court affirmed, that they were **not** supervisors and

therefore could vote in a union election even though the evidence reflected that, in the event of a hostile attack, "a response team leader would direct security officers to return fire, interject themselves between the attackers and the plant, and provide guidance on the appropriate use of deadly force." *Id*. at 1077. Chief Judge Smith brought up this very comparison during oral argument before the panel in this case.

The standard for supervisory status under the NLRA should be applied consistently and uniformly regardless if the status is being asserted by the employer or the union.

C. Conflict with NLRB *Jefferson Chemical* Case:

Third, the Employer asserts the Panel Opinion also conflicts with, and is contrary to, the decision of the National Labor Relations Board in *Jefferson Chemical Co.*, 237 NLRB 1099 (1978)

The NLRB found, and the Panel Opinion of this Court upheld, that employee Johnston was a statutory supervisor under the Act, and thereby lost his rights under the Act, simply by, as a trusted employee in a small rural community, telling his employer that he or a co-worker knew the families of two applicants. However, as outlined in detail by Chief Judge Smith in his dissent, such simple and brief references do not, as a matter of law, confer supervisory status on an employee. In this regard, Chief Judge Smith stated (Slip opinion pp. 19-20):

> . . . And the majority cites no authority for the proposition that merely knowing an applicant's family automatically qualifies as a

> sufficient basis upon which an individual may exercise independent judgment in recommending for hire. Instead, it seems that this is precisely the type of recommendation that the Board avoids elevating to supervisory status. *See, e.g., Jefferson Chem.*, 237 N.L.R.B. at 1102.

Such standard for supervisor status applied by the NLRB (and affirmed by the Panel Opinion) in this case will result in virtually all employees of companies who recommend or give a background reference for applicants being statutory supervisors under the Act. Such a result would obviously not be in accordance with prior Board precedent, and not reasonable for future application. This very point was made by the Administrative Law Judge in *American River Transportation Co.*, 2001 WL 1603863 (2001), reversed on other grounds, 347 NLRB 925 (2006), where he stated (2001 WL 1603863 Slip opinion p. 18): "Something more than an employer's accepting referrals from its workforce, and placing some reliance [on] them, is necessary to constitute a supervisory recommendation. **Otherwise an employer's generalized use of word-of-mouth referrals could confer supervisory status on its entire workforce."** [Emphasis added.]

CONCLUSION

WHEREFORE, Missouri Red Quarries respectfully requests that the Court rehear the appeal *en banc*, and for any other relief the Court deems just and proper.

Respectfully submitted,

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DATED: This 19th day of May, 2017.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Petition for Rehearing *En Banc*** was served upon the following individuals, to-wit:

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by electronic filing with the United States Court of Appeals, Eighth Circuit, on this 19th day of May, 2017.

By /s/ Rick E. Temple
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CERTIFICATE OF COMPLIANCE

1. This Petition complies with Fed. R. App. P. 32, and contains 2,510 words.

2. This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

By /s/ Rick E. Temple
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